

D.P.U. 89-DS-123

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by J. Biotti and Sons, Inc.

APPEARANCE: Joseph Biotti, III, Superintendent
J. Biotti and Sons, Inc.
97 Adams Street
Newton, Massachusetts 02195
FOR: J. BIOTTI AND SONS, INC.
Respondent

Henry Cappuccio, Engineer
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On February 6, 1990, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to J. Biotti and Sons, Inc. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on November 30, 1989 on Northhampton Street, Roxbury, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to underground facilities operated by Boston Edison Company ("Boston Edison" or "Company").

On February 8, 1990, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In that letter, the Respondent asserted that the damaged electric line on Northhampton Street had been placed at an inadequate depth and was imbedded within the concrete which lay directly below the road. In a letter dated April 3, 1990, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing.

On December 4, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on March 4, 1992 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Henry Cappuccio, a public utility engineer with the Division, represented the Division. Joseph Biotti, III, superintendent for J. Biotti and Sons, testified for the Respondent. All exhibits offered were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division's Position

The underground damage reports offered by the Division indicates that the Respondent damaged a Company service and duct bank on Northhampton Street in Dorchester (Exh. D-2). The Division alleged that the Respondent had failed to use reasonable precautions to prevent damage to the pipes (Tr. at 7-8).

The Division contended that the damage had occurred as a result of a lessening of support beneath the duct bank which caused the duct bank to collapse, thereby causing damage to the service line contained within the duct bank (id. at 11-12). The Division indicated that the duct bank that was damaged was between 18 and 24 inches in height (id. at 11). The Division also indicated that the damage occurred at a depth of three feet (id. at 11). Mr. Cappuccio stated that the damage might not have occurred if the Respondent had used a jackhammer to expose the utility instead of a backhoe (id. at 27).

Mr. Cappuccio stated that extra care must be taken when locating and excavating near underground facilities because the depths of those facilities might change over time (Tr. at 43-44). Finally, Mr. Cappuccio stated that his knowledge of the case was derived from conversations with company personnel, and that he did not personally visit the site in question (id. at 14).

B. The Respondent's Position

Mr. Biotti testified that he had visited the site personally, and although he had not been at the site during the moment that the damage occurred, he had been the person who called the Company to report the damage soon after it occurred (id. at 16, 21, 27). Mr. Biotti also testified that the Respondent was aware of the lateral location of the Company's facility when it was

damaged (id. at 21, 36). Mr. Biotti further testified that the markings for the Company's facilities were accurate and visible at the time of the damage (id. at 26, 36).

Mr. Biotti stated that the Respondent did not excavate from below the duct bank to let it collapse, but instead excavated from above the duct bank and penetrated it while removing the concrete base of the street (id. at 17, 24-25). Mr. Biotti also stated that the duct bank was embedded in the concrete base of the street, just below an asphalt, cobblestone, and concrete mixture, and was too shallow (id. at 22, 28, 30-31, 32; Exh. C-1). Mr. Biotti further stated that he had never encountered a duct bank embedded in the concrete base of a road before (Tr. at 33-34).

Mr. Biotti asserted that the Respondent was breaking up the mixture of concrete and cobblestones with a backhoe to facilitate the locating of facilities by hand, when a tooth of the backhoe penetrated the duct bank and damaged a service line located within that bank (id. at 28-29). Mr. Biotti also stated that the service line that was damaged was located at the top of the duct bank which was embedded in the concrete base of the road (id. at 30-31, 32; Exh. C-1). Mr. Biotti contended that using a jackhammer to break up the cobblestone and concrete mixture would have been more dangerous than using a backhoe, and would have led to a more severe power outage (Tr. at 28).¹ Mr. Biotti also stated that the Respondent had exercised reasonable precautions when the damage occurred, such as removing the top layer of asphalt and rock to get to earth and begin locating underground facilities by hand (id. at 6, 40-42, 44).

¹ Mr. Biotti stated that had the Respondent known that the duct bank was embedded in the concrete before excavating, it might have been able to proceed cautiously with jackhammers to remove the materials without breaking the service line (id. at 39-40).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc. v. Bay State Gas Co., D.P.U. 89-DS-15 (1990); Petricca Construction Company v. Berkshire Gas Company, D.P.U. 88-DS-31 (1990). John Mahoney Construction Co. v. Boston Gas Company, D.P.U. 88-DS-45 (1990); Northern Foundations, Inc. v. Berkshire Gas Company, D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from the duty to use reasonable precautions. Fed Corp, supra; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons,

D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, *supra*, at 9; Fed. Corp., *supra*, at 5-6. In addition, the mere fact that a facility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damaged will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp., *supra*; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

IV. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to exercise reasonable precautions. Before deciding whether reasonable precautions were taken, the actual location of the duct bank must be established. The Respondent asserted that the duct bank that was damaged was located at a shallow depth, and was physically attached to the street's concrete base. The Respondent testified that the service was located within a fused mixture of asphalt, cobblestone and the concrete base of the road, and contended that it had taken all of the precautions that it could have taken to protect the facilities under the circumstances. The Respondent's witness was also at the site soon after the damage occurred.

In contrast, the Division alleged that the surface of the duct bank was not embedded in the street's concrete base, but was instead located at the proper depth of three feet. In support of the Division's claim, the Division presented an underground damage report from the Company which it alleged supported its claim. However, the Division failed to present the author of that report, or any witnesses who were present on the site during the Respondent's excavation to corroborate that evidence. In addition, we note that the base of the duct bank could have been located at a depth of approximately three feet, while the top of the bank was embedded in the concrete base of the street, between 18 and 24 inches above. Based on the above, the Department finds that the facility was most likely located in the concrete base of the street.

Although the depth of the facility was shallow, the Department has consistently found that a variation in depth does not relieve an excavator from the duty to use reasonable precautions. See Fed. Corp., supra; Amorello v. Commonwealth Gas Company, D.P.U. 89-DS-61 (1990). However, the depth of an underground utility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. See New England Excavating, supra.

The Division alleged that the Respondent failed to use reasonable precautions by using a backhoe and not jackhammers to locate the damaged facility, and that this action caused damage to that facility. However, the Respondent stated that it was not attempting to locate the facilities with the backhoe, but instead, that it was breaking up and removing the concrete and cobblestone base so that it could locate the underground facilities through hand-digging. The Respondent also contended that using a jackhammer may not have prevented damage because the line and duct

bank were embedded in the concrete. The Respondent further contended that using a jackhammer could have made the power outage more severe and been more dangerous.

Although the Division alleged that additional precautions should have been taken, the Division did not provide evidence as to what reasonable precautions, other than using jackhammers, the Respondent could have taken to prevent damage. Based on the evidence presented, use of a jackhammer may not have prevented the damage from occurring.

In specific instances where there has been an allegation without demonstrating further precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp., supra; Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990). Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra. The Division did not adequately demonstrate that the Respondent failed to exercise reasonable precautions when excavating at the locus.² Accordingly, the Department finds that the Respondent did not fail to exercise reasonable precautions when excavating on Northhampton Street, Roxbury, Massachusetts, on November 30, 1989, in conformance with the requirements of the Dig-Safe Law.

IV. ORDER

² The Supreme Judicial Court may set aside a decision as prejudiced for further action when that decision is "(e) Unsupported by substantial evidence." G.L. c. 30A, §§ 14(7). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion. G.L. c. 30A, §§ 1(6).

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That J. Biotti & Sons Inc. did not violate the Dig-Safe Law when it excavated on Northhampton Street, Roxbury, Massachusetts, on November 30, 1989; and it is

ORDERED: That the NOPV issued against the Respondent be and is hereby DISMISSED.

By Order of the Department,